In the Supreme Court of the United States

OCTOBER TERM, 1924

MAX M. HOROWITZ, APPELLANT
v.
THE UNITED STATES
No. 74

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims sustaining a demurrer filed by the United States to the petition on the ground that no cause of action is shown.

The petition alleges that about December 20, 1919, the claimant bid for the purchase of certain silk, and about two days later was notified by the Ordnance District Salvage Board of the United States at New York City that the Washington Ordnance Salvage Board had approved the sale upon such bid, and that thereupon the claimant paid five thousand dollars ($5,000.00) on account of the purchase price and made a further payment of five thousand dollars ($5,000.00) February 6, 1920, the balance of the purchase price being paid February 16, 1920, pursuant to an arrangement between the claimant and the chief of the Textile Division of the New York City Salvage Board.

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It is further alleged that the purchase was made by the claimant with the understanding that he should be given opportunity to resell the silk and that the chairman of the New York City Board knew that the price of silk fluctuated, and agreed that if claimant would make the purchase the New York City Board and other departments of the Government would ship the silk within a day or two after shipping instructions should be given by the claimant; and that February 10, 1920, the claimant notified the chairman of the Textile Division of the New York City Board verbally and in writing that he was about to make final payment of the purchase price and to give shipping instructions, which notification, it is alleged, charged upon the New York City Board the duty of taking steps preparatory to shipping the silk from the city of Washington. It is then alleged that upon the payment of the balance of the purchase price the claimant notified the New York City Board in writing to ship the silk at once to a consignee designated by him, and that he was informed by the chief of the Textile Division of the New York City Board that the shipment would be made February 16 or 17; and on February 18 the New York City Board notified the claimant in writing that it had received his instructions and ordered the silk shipped to the consignee designated.

It is then alleged that on the day his bid was accepted, December 22, 1919, claimant received three sample cases of the silk and sold the entire purchase

ot to the consignee later designated by him, but before making such sale was notified by the chief of the Textile Division of the New York City Board that the silk would be packed and placed in condition for prompt and immediate shipment and that he, the claimant, would not have made such resale had he been informed that the silk would not be forthwith shipped by freight from Washington. It is then alleged that claimant was not informed until March 4, 1920, that the silk had not been shipped to the consignee designated by him on the sixteenth of February and that the silk did not in fact arrive at New York City until about March 12, 1920, at which time the consignee to whom the claimant had made resale, refused to accept the delivery, and that as a result the claimant suffered a loss of ten thousand eight hundred and eleven dollars and eighty-four cents ($10,811.84). It is further alleged that the claimant learned March 4, 1920, that the silk had not been shipped because the Government through one of its agencies, the United States Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment as directed by him was, therefore, held up but later shipped by the Government by express.

Judgment for the amount alleged to have been lost by the claimant because of the delay in shipment by the Government is then prayed, upon the theory that the delay involved a breach of contract by the Government. This theory was denied by the Court

of Claims, and a demurrer filed by the United States was sustained (R. p. 5) upon the theory that the petition shows no cause of action.

ARGUMENT

The Act of August 29, 1916 (39 Stat. 645), declared that—

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The President in the exercise of the powers conferred upon him by the Act mentioned issued his proclamation December 26, 1917 (40 Stat. 1732), and thereby took possession of the transportation systems through the Secretary of War and delegated his powers of control to the Director General of Railroads. As stated in the memorandum of the Court of Claims (R. p. 5), it is not alleged in the petition that the embargo which delayed the shipment of the silk in this case was established contrary to law or in excess of the lawful powers of the Director General.

The question of whether the United States as a contractor can be liable for the public acts of the United States as a sovereign has been determined

in many cases by the Court of Claims. In the case of *Israel Deming* vs. *The United States*, 1 C. Cl. 190, referring to the contention that the Government can be so held, it is declared—

> This statement of his case is plausible, but is not sound. And herein is its fallacy; that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the Government and a private party cannot be *specially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the Government entering into a contract, stands not in the attitude of the Government exercising its sovereign power of providing laws for the welfare of the state. The United States as a contractor are not responsible for the United States as a lawgiver. Were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this Court the United States can be held to no greater liability than other contractors in other courts.

Again, in the case of *Joseph Wilson* vs. *The United States*, 11 C. Cl. 513, it is stated, at page 521:

> This double character of the Government cannot be lost sight of in any of its transactions. The Quartermaster General was the contracting agent of the United States, and bound the corporation. For his acts, within the scope of his authority, the Government, as a contracting party, is liable. But neither the Quartermaster General nor any of his assistants, nor any other contracting agent of the Government, interfered with the claimant or prevented performance on his part. The military governor of Washington, on the other hand, was not a contracting agent of the Government, and his acts were limited strictly to the public defense. He did not interfere with this contractor as such. His order was general, applying to all persons, and affecting the claimant precisely as though he had contracted with any private corporation. It has been repeatedly held in this Court, and often reiterated by the Supreme Court, that the Government, as a contractor, can be held to no greater liability than any other contractor; and that seems decisive of the case now before us; for the Government, as contractor, did nothing which would have cast a legal liability upon any other contractor.

To the same effect see the case of *Jones and Brown*, 1 C. Cl. 383.

Section 14 of the Act of March 21, 1918 (40 Stat. 458), declares:

> The Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace.

The United States was at war at the time the President issued his proclamation of December 26, 1917, assuming control of the transportation systems and delegating his authority to regulate them to the Director of Railroads, and at the time of the issuing of the embargo as referred to in the petition herein, the ratifications of the treaties of peace had not been exchanged and the President had not issued any proclamation upon the subject.

The Act of August 29, 1916, *supra*, allowing the President in time of war to assume control of the railway systems, was passed pursuant to the war power of Congress and the President was authorized to exercise such control through such agent or agents as he might elect, and his proclamation of December 26, 1917, in view of the control Act of March 21, 1918, did not operate to suspend the operation of the Interstate Commerce Acts forbidding the granting of preferences to individual shippers.

The power to regulate the conduct of the business of the carriers was delegated by the President to the Director General of Railroads and the embargo issued by the latter and referred to in the petition in this case was "Nothing more than a regulation incident to the proper conduct of the business of the railroads," and an "incident of the control, in the same sense that any embargo laid by a carrier, while a railroad was under its control would be incidental to the proper conduct of its business." *United States* v. *Metropolitan Lumber Co.*, 254 Fed. (D. C.) 335, 351.

The contract in this case is, of course, evidenced by the bid of the claimant and its acceptance by the Washington Ordnance Salvage Board, and, even though that contract might have required the United States to deliver the silk for shipment by freight as directed by the claimant, still the existence of an embargo properly issued by the Director of Railroads would have prevented compliance with such a request.

The petition in this case alleges that the effect of the embargo established by the Director General of Railroads was to render it impossible for the United States as a contractor to perform its agreement with the claimant and make immediate shipment of the silk by freight; in other words, that the embargo terminated the contract and constituted a breach upon the part of the United States.

It is a well settled rule of law that where performance of a contract is rendered impossible by operation of law, failure to perform will be excused.

In *Calhoun* v. *Massie*, 253 U. S. 175, it is declared:

> An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results.

As heretofore pointed out, the Director General in establishing the embargo acted under a delegation from the President of the power conferred upon him by the Act of August 29, 1916 (39 Stat. 645), and the claimant now seeks to hold the Government as a contractor answerable because it saw fit to obey a rule made by the Government in its capacity as a sovereign and lawmaker.

In the case of *Omnia Co.* v. *United States*, 261 U. S. 502, the facts were that the Allegheny Steel Company had entered into a contract to supply steel plate at a specified price, which contract had come into the possession of the appellant by assignment and was of great value. Subsequently the Government requisitioned the output of the Steel Company for the year 1918 upon the authority of certain war legislation and directed that Company not to comply with the appellant's contract upon the threat that otherwise the entire plant would be taken over and operated for the public use. It was alleged that by the orders of the Government the contract had been

rendered unlawful and impossible and, therefore, those orders constituted in effect the taking for the public use of appellant's right of property in the contract.

In sustaining a demurrer to the complaint, this Court quotes with approval at page 512, the following language:

> If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it can not be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

Again, it is declared:

> In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.
>
> The Government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If ap-

> pellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

The brief of appellant seeks to incorporate into the contract itself negotiations which led to the making of the bid and which followed the acceptance of that bid by the Government as a contractor, and to hold the United States responsible for some knowledge alleged to have been possessed by an officer of the New York Salvage Board that the price of silk fluctuated rapidly and that the claimant considered the time of delivery as of the essence of his contract and that, therefore, the Government is responsible to him for his alleged loss of profit by reason of its failure as a contractor to disregard the embargo established by the Director General of Railroads and ship the silk by freight at the time designated by him.

This position can not be justified, and the argument and citation of authorities by counsel for the appellant are not in point and have no bearing upon the issue involved.

The brief of appellant further prays that he may be allowed to amend his petition by alleging that the Government was not prohibited or prevented from performing the contract and shipping the silk on February 16 by an embargo.

Such an amendment, however, would be expressly contradictory of the allegation of paragraph 6 of the petition as filed, which declares (R. p. 3):

> That claimant was not notified of the shipment as ordered, and after considerable inquiries, phone calls, letters, and telegrams, claimant learned on March 4th, 1920, that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up, and afterwards the Government shipped the said silk to the consignee, by express.

Further no application for leave to amend was submitted to the court below.

The judgment of the Court of Claims sustaining the demurrer in this case should be affirmed.

Respectfully submitted.

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SEPTEMBER, 1924.

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